No. 10607.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LESTER ARTHUR CORSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

Appellant, as defendant below, was charged with the violation of the Second War Powers Act (Public Law 507, 77th Congress, 2nd Sess., March 27, 1942) and Section 1394.8177(b) of Ration Order 5C (7 F. R. 9135) as amended, issued pursuant to said Act. [R. 4]. He was found guilty by the jury [R. 54] and the entry of judgment of conviction and order denying motion for new trial were made on November 9, 1943 [R. 30, 31]. Notice of appeal was made on the same day [R. 33]. The jurisdiction of this Court rests on 28 U. S. C., Sections 225 and 723a; Rule III of the Rules of the Supreme Court in criminal cases.

Statement of the Case.

It is assumed that pages 1-3, inclusive, of Appellant's Opening Brief, contain appellant's Statement of the Case. In so far as the same relates to some of the proceedings, it is correct; but in so far as it relates to facts, it presents matters entirely immaterial to the appeal. Rather than to point out the immateriality of the facts and place them in their proper chronological order and perspective, appellee will in its Point III succinctly set out the material facts surrounding the actual commission of the crime.

Questions Presented by the Appeal.

1. Is the Second War Powers Act (50 U. S. C. A. App., Section 600 *et seq.*) constitutional?

2. Is the commission of an act prohibited by Ration Order 5C, issued pursuant to and after the passage of the Second War Powers Act, a crime?

3. Does Count II of the information filed against appellant sufficiently charge a crime?

4. Was the information properly filed?

5. Was the evidence sustaining the charge sufficient so that Motions for a Directed Verdict were properly denied?

6. Can appellant question the sufficiency of the instructions where he never requested further instructions nor excepted to those given on the ground that they were insufficient?

ARGUMENT.

I.

Count II Sufficiently Charges an Offense. (Answer to Appellant's Point I.)

Appellant cites twenty-nine cases[1] as authority to support his argument that Count Two of the Information fails to state an offense against the laws of the United States (Br. 4). The consensus of those cases may be stated in the words of this Court's opinion in *Peters v. United States,* 94 Fed. 127, wherein it is said at page 131:

> "Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated; but where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to charge the defendant in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute. Ledbetter v. U. S., 170 U. S. 606, 610, 18 Sup. Ct. 774, and authorities there cited; 10 Enc. Pl. & Prac. 483, and authorities there cited.
>
> "* * * Many of them [indictments] might, doubtless, have been made more definite and clear. Our object will be to get at the merits, if any there be, of the numerous objections urged, — to ascertain whether the defendant has been prejudiced by the course pursued by the court; whether any of his legal rights has been invaded or violated; and to

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[1] *Kerns v. United States* (C. C. A. 10), 74 F. (2d) 351, is erroneously cited as appearing at page 251. *United States v. Strobach* (C. C. Ala.), 48 Fed. 902, is erroneously cited in Volume 28. *Hale v. United States* (C. C. A. 4), 89 F. (2d) 578, is erroneously entitled *Hall.*

brush away the cobwebs of pure technicalities with which the trial of the case, as in all criminal cases, seems to be surrounded.

"The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet; and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. U. S. v. Simmons, 96 U. S. 362; U. S. v. Carll, 105 U. S. 612; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144; Evans v. U. S., 153 U. S. 584, 587, 588, 14 Sup. Ct. 934, 939; Batchelor v. U. S., 156 U. S. 426, 15 Sup. Ct. 446; Cochran v. U. S., 157 U. S. 286, 290, 15 Sup. Ct. 628."

With those general observations in mind, the grounds urged by appellant are obviously not well taken.

The Information is in the language of the statute[2] and order[3] allegedly violated. The Information refers specifi-

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[2]Public Law 507, 77th Congress, Title 3, Section 301 (5); 50 U. S. C. A., App. 633: "Any person who willfully performs any act prohibited, or willfully fails to perform any act required by any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

[3]Ration Order 5C, Sec. 1394-8177(b): "No person shall transfer or assign and no person shall accept a transfer or assignment of any coupon book or any bulk, inventory or other coupon (whether or not such book was issued as a ration book and whether or not such coupon was issued as a ration or as part of a ration book) or other evidence, except in accordance with the provisions of Ration Order No. 5C." Note: Appellant does not correctly quote the section at page 7, Statement of Jurisdiction.

cally to the forbidden conduct, *i. e.,* the wilful transfer and assignment of coupons in a manner other than in accordance with the provisions of Ration Order 5C, and cites the particular statute and order.

Upon what authority appellant can support his statement that the accused and the court did not know what law or order accused is charged with violating is not known and is certainly not disclosed in his brief. Apparently appellant would have the United States set out the particular order *haec verba.* That, of course, need not be done as the Courts will take judicial notice thereof.

> *United States v. Casey* (D. C. E. D. Ohio, 1918), 247 Fed. 362.

The requirements enunciated in the *Peters* case were entirely satisfied. The Information here charged the defendant with the offense in the language of the Second War Powers Act and the applicable order promulgated pursuant to said Act, with sufficient description to inform the defendant of the knowledge of the offense charged and the cause of the accusation and with such certainty that he could prepare his defense and plead the judgment in bar in subsequent prosecution for the same offense. That is enough.

> *Taylor v. United States* (C. C. A. 9, April 26, 1944), 142 F. (2d) 808;
>
> *Feigin v. United States* (C. C. A. 9, 1922), 279 Fed. 107;
>
> *Olmstead v. United States* (C. C. A. 9, 1928), 29 F. (2d) 239;

Young v. United States (C. C. A. 9, 1921), 272 Fed. 967;

Dell'aira v. United States (C. C. A. 9, 1926), 10 F. (2d) 102;

F. Ruffino v. United States (C. C. A. 9, 1940), 114 F. (2d) 696.

It is sufficient to charge a statutory crime in the words of the statute where, as here, the words themselves freely, directly and expressly, without uncertainty and ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.

Azuma Kubo v. United States (C. C. A. 9, 1929), 31 F. (2d) 88.

As a matter of fact, appellant does not, as he cannot, urge that the Information fails to state every element of the offense charged, that he did not know what he had to meet, or that the regulation does not show with accuracy the extent to which he may plead the conviction. Appellant seems to make only one complaint: he did not know the nature and cause of the accusation because he could not, or it was difficult to, find the statute or order. Such a complaint obviously has no merit. If appellant in good faith could not find the statute, he could have secured the same through a Motion for Bill of Particulars. It is significant that he *did not* make such a motion.

II.

The Second War Powers Act Properly and Legally Provides That the Wilful Performance of an Act Prohibited by an Order Issued Pursuant Thereto, Viz., Ration Order 5C, Constitutes an Offense Against the Laws of the United States. (Answer to Appellant's Points II, III and IV.)

A. Appellant's Position.

A direct criminal sanction for the enforcement of rationing regulations and orders is provided in the Second War Powers Act of 1942 (Public Law 507, 77th Congress, 2nd Sess.), Title III, Section 2 (a)(5) (See footnote 2). Therefore, direct criminal prosecution can be brought against any person who has violated any rationing order or regulation even though such order or regulation was not issued until after the effective date of the Act, of March 27, 1942. It should be carefully noted herein that the information charges not only a violation of the provisions of an order but also a violation of the Second War Powers Act itself by so stating specifically and further alleging that the defendant acted "contrary to the form of the statute in such case made and provided." [R. 4].

B. The Second War Powers Act and Ration Order 5C Are Constitutional as a Legal and Valid Delegation of Power.

The provisions of the Second War Powers Act, pursuant to which Ration Order 5C was issued, through the Office of Price Administration, are not unconstitutional as an invalid delegation of power.

In *United States v. Randall* (D. C. E. D. N. Y., 1943), 50 F. Supp. 139, the court was confronted with the constitutionality of the particular ration order and section thereof to be considered herein. The court therein stated:

> "The purpose of this enactment was to promote the general welfare and allocate the control of gasoline supply that was necessary for the defense of the United States. The President could not fulfill these functions individually but had to do so through various agencies.
>
> "The Executive Orders of the President of the United States, and the rules and regulations prescribed by the administration office of Price Administrator issued pursuant thereto, are valid and effectual and do not violate any provision of the Constitution of the United States or any laws of the United States."

That decision was appealed to the Circuit Court, and in *United States v. Randall* (C. C. A. 2, 1944,) 140 F. (2d) 70, the lower court was affirmed in the following words:

> "(1) Subsection (a) (2) of section 2 of Act of June 28, 1940, as amended by Second War Powers Act of 1942, §301, section 633, 50 U. S. C. A. Appendix, provides that whenever the President 'is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense * * *,' he may allocate such material or facilities in such manner as 'he shall deem necessary

> or appropriate in the public interest and to promote the national defense.' Other provisions authorize the President to obtain such information, require such reports and make such investigations as he may in his discretion think necessary or appropriate to the enforcement or administration of the subsection and to exercise his powers and discretion through subordinates. He did so through the Office of Price Administration. We entertain no doubt that the standard which the statute sets up is amply sufficient to meet the claim of invalid delegation. See McKinley v. United States, 249 U. S. 397, 399, 39 S. Ct. 324, 63 L. Ed. 668, Avent v. United States, 266 U. S. 127, 130, 45 S. Ct. 34, 69 L. Ed. 202."

In *United States v. Maviglia* (D. C. N. J., 1943), 52 F. Supp. 946, the defendant was charged with violation of Section 1394.8177(c) of Ration Order 5C. The Court therein found the Second War Powers Act and the Regulation constitutional.

See also: *O'Neal v. United States* (C. C. A. 6, 1944), 140 F. (2d) 908, cert. den. 321 U. S. [No. 2] vii; *Henderson v. Bryan* (D. C. S. D. Calif., 1942); 46 F. Supp. 682; *United States v. Tire Center* (D. C. Del., 1943), 50 F. Supp. 404 (all regarding tire rationing regulations); *United States v. Wright* (D. C. Del., 1943), 48 F. Supp. 687 (regarding Ration Order No. 3); *Brown v. Bernstein* (D. C. M. D. Pa., 1943), 49 F. Supp. 729 (regarding meat rationing).

C. The Second War Powers Act Creates the Crime Charged Herewith.

It is apparent that appellant must limit himself to the argument that the Second War Powers Act did not authorize the Ration Order 5C because the penal provisions therein did not make a crime the *particular acts* which appellant is accused of doing. Such a limitation is forced upon appellant when his statements and authorities in Points II, III and IV are analyzed. Point II is bottomed on the statement that, "There are no penal provisions in the Second War Powers Act of March 27, 1942 relating to the matters herein charged" (Br. 6). Appellant cannot be overlooking the section of the Act making it a crime for any person "who willfully performs any act prohibited * * * by any provision of this subsection (a) or any rule, regulation or order thereunder, *whether heretofore or hereafter issued*, * * * shall be guilty of a misdemeanor, and shall, upon conviction be fined not more than $10,000 or imprisoned for more than one year, or both," (emphasis supplied). The act manifestly makes criminal the willful performance of any act prohibited by Ration Order 5C.[4] Point III states (Br. 7) that "This Order cannot make criminal that which the statute itself does not make criminal." Point IV (Br. 9) argues that the Act does not define the crime and therefore any attempt to create a crime by regulation is illegal.

Appellant in attacking the instruction given by the District Court (Br. 8) discloses the heart of his argument

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[4]Appellant does not contend that Ration Order 5C was not properly promulgated in accordance with the Second War Powers Act. For a history of Ration Order 5C and the sequence of events whereby it was issued by the Office of Price Administration see *United States v. Randall*, 50 F. Supp. 139.

when he states that the instruction was erroneous because the Second War Powers Act "did not require the performance or forbid the performance of any act charged" nor "did the act make the performance or non-performance of such act or such regulation an offense."

The Second War Powers Act provides that "whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account, or for export, the President may allocate such material or facilities in such manner upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." Further, the Act (Section 2(a)(8)) clearly authorizes the President to delegate that power.

It is not the Ration Order 5C but the Second War Powers Act in Section 2(a)(5) which creates the particular crime. The legality of such a position is well established by the authorities. In *United States v. Grimaud* (1910), 220 U. S. 506, 55 L. Ed. 563, 31 S. Ct. 480, the Court considers the entire matter of Congressional right to provide general regulations for various and varied details. In it the following opinion is stated at page 521:

> "It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes, from which we have quoted declare, that the privilege of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply 'with the rules and regulations covering such forest reservation.' The same act makes it an

> offense to violate those regulations, that is, to use them otherwise than in accordance with the rules established by the Secretary."

and at page 522:

> "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

and at page 523:

> "The Secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the Secretary, but, as the indictment properly concludes, 'contrary to the laws of the United States and the peace and dignity thereof.'"

In *United States v. Casey* (D. C. Ohio, 1918), 247 Fed. 362, the Court in considering a demurrer and motion to quash an indictment for violation of a regulation of the Secretary of War promulgated pursuant to the Selective Service Act, at page 365, states:

> "The regulation promulgated by him does not declare its violation a punishable offense. It is the act of Congress which declares that the violation of such regulation after its promulgation shall constitute a misdemeanor by the person transgressing it, and that he shall be fined or imprisoned, or both, as a penalty therefor. United States v. Breen (C. C.), 40 Fed. 402; Railroad Co. v. Commissioners, 1 Ohio St. 77, 88, 89; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Dastervignes v.

United States, 122 Fed. 30, 58 C. C. A. 346 (C. C. A. 9); United States v. Ormsbee (D. C.), 74 Fed. 207."

Appellant cites two cases in support of the statement that "a regulation cannot make its violation a criminal offense in the absence of a statute making it an offense" (Br. 8).

The case of the *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Company* (1897), 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896, concerns the jurisdictional power of the Interstate Commerce Commission to make a certain order and is not a criminal action. It is seen at once that that case is not in point. The case of *United States v. Eaton* (1892), 144 U. S. 677, 36 L. Ed. 591, 12 S. Ct. 764, is a criminal action, but the circumstances therein do not fit the instant cause because, as clearly pointed out in the *Grimaud* case, the *Eaton* case can be distinguished on the ground that therein the act made criminal the failure to omit any of the things "required by law," whereas in the instant cause the Act makes criminal the doing of things prohibited by "any rule, regulation or order thereunder whether heretofore or hereafter issued."

As stated in *United States v. Smull* (1915), 236 U. S. 405, 59 L. Ed. 641, 35 S. Ct. 349, the only question is whether the regulation was one that could be imposed, and an inquiry into that matter is divided into two

branches: (1) Was the regulation addressed to the enforcement of the laws? (2) Was it inconsistent with any specific provision of the statute? That Ration Order 5C could be imposed has already definitely been decided in the *Randall* cases, *supra*, and the *Maviglia* case, *supra*. See, also: *Shreveport Engraving Co. v. United States* (C. C. A. 5, 1944), 143 F. (2d) 222.

In Point IV appellant cites three cases[5] as authority for the proposition that the statute itself must contain all the elements of the offense so clearly that men of common understanding may know the conduct forbidden. But what these cases really hold is that the criminal statute cannot be so vague that men of common intelligence must guess at its meaning. Such a situation is not present here nor does appellant contend that it is.

In conclusion, to paraphrase the closing words of the opinion in *United States v. Randall* (C. C. A. 2, 1942), *supra*, how it can seriously be argued that the violation of the ration order is not a criminal offense passes our comprehension in view of Section 2(a)(5) of the Second War Powers Act. It is not necessary that the congressional act specifically forbid the exact conduct so long as it forbids the conduct prohibited by an order properly issued pursuant thereto.

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[5]*Lanzetti v. New Jersey* is reported in 306 U. S. 451, 83 L. Ed. 888, 59 S. Ct. 618.

III.

There Was Substantial Evidence Sustaining the Charge; Therefore, There Was No Error in Denying the Motions for a Directed Verdict. (Answer to Appellant's Point V.)

It has been settled by this Court that, on motion for a directed verdict for defendant in a criminal case, if there is "proper, legal, competent or substantial evidence sustaining the charge," it should be submitted to the jury. *Maugeri v. United States* (C. C. A. 9, 1935), 80 F. (2d) 199, 202; *Gorin v. United States* (C. C. A. 9, 1940), 111 F. (2d) 712. The government presented such evidence at the trial, and the District Court committed no error in denying appellant's motions for a directed verdict.

Before briefly considering that evidence, we wish to point out that appellant's remarks concerning the evidence (Br. 2, 3, 10-12) are replete with erroneous and immaterial statements. The jury found the issues in favor of the government and reargument concerning defense matter is impertinent.[6] Further, some of the matters urged are bottomed upon points not raised at the trial or in this appeal.[7]

The case presented by the government proved the following facts material to the present issue:

John E. Foster and Jona H. Taylor, two OPA investigators (hereinafter referred to as "investigators"),

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[6]The continual emphasis upon Thompson's sentence (Br. 3, 11); the mention that he was an ex-convict (Br. 2, 10); and the statement about his wanting to help (Br. 3, 12), have no proper place in this cause at this time.

[7]*E.g.*, no error is specified that the warrant should have been quashed because the arresting officers had no authority to make the arrest.

searched one Edgar E. Thompson and his wife and his car at about 6:30 p. m., September 2, 1943, and found no gasoline rationing coupons of any kind in their possession or in the car [R. 71, 99]. The two investigators then followed Thompson, who, with his wife, drove in their car to 8801 Sunset Boulevard [R. 71, 85]. The investigators were in their own car and had Thompson under observation at all times [R. 71]. Thompson parked his car next to the above address which was a used car lot [R. 72]. The investigators parked their car across Sunset Boulevard [R. 72]. Thompson got out of his car, went to the lot adjoining 8801, talked to the man there [R. 72]. Defendant Corson then drove up, walked over to Thompson and the other man [R. 73]. No contact was made among any of the three [R. 73]. Thompson and Corson returned to the lot at 8801 [R. 73]. Corson went to the back of the lot [R. 73], returned to Thompson and handed him a white, folded package which Corson had taken from his inside coat pocket [R. 74]. Thompson put the package in his right, outside coat pocket [R. 74, 101]. The investigators immediately started their car, proceeded across the street, got out of the car [R. 74]. Taylor took from Thompson's right, outside coat pocket the said package consisting of four sheets of gasoline coupons, totalling 800 type "TT" coupons [R. 75, 76, 100]. From the time the investigators had searched Thompson at 6:30 p. m. until Taylor took the coupons out of Thompson's pocket, Thompson had never been out of the vision of either investigators "even for a second" [R. 75].

While immaterial, it should be pointed out for the clarification of the Court that Thompson had seen Corson *twice* in the same day. The first time he saw him, nothing

material occurred [R. 83, 89] and afterwards he was actually out of the sight of the investigators [R. 89], but the *second* time was the time that the transfer alleged in the Information took place. It was just prior to this last visit that Thompson, his wife and his car were searched and from that time until the investigators took the coupons from his person after Corson had transferred them to him he was continually in the sight of the investigators [R. 89].

Appellant's claim that the Court should have directed the verdict is based upon two matters:

1. Appellant states that "At no time did the officers ever find or actually see any coupons in the possession of Corson" (Br. 11). That statement is palpably erroneous. The investigators saw Corson hand the folded "package" to Thompson—who, they knew, had no coupons on him—and when they took this "package" which Thompson had placed in his right-hand pocket, they found it to be 800 type "TT" gasoline coupons. Thus, *the investigators had seen the coupons actually in the possesion of Corson when he took them out of his pocket* and handed them to Thompson.

2. The government proved that Corson had violated Ration Order 5C when it proved that he had assigned and transferred the coupons to Thompson. The word "assigned" means "to transfer." Black's Law Dictionary (3d Ed.), page 154; *Seventh Nat. Bank v. Shenandoah Iron Company* (C. C. Va., 1887), 35 Fed. 436, 440. Ration Order 5C itself provides the definition of "transfer" in Section 1394.7551 (2) (40) thereof, wherein it is defined as to "sell, give, exchange, lease, lend, deliver,

supply or furnish." The handing of the coupons from Corson to Thompson satisfies the requirements of the order. Even the definition proposed by appellant (Br. 11), that the words "transfer and assign" mean the conveyance of right, title or property, either real or personal, from one person to another, fits the facts herein and the jury was instructed on the particular point involved in the manner requested by defendant [R. 128, 134].

IV.

The Information Was Properly Filed and Such Filing Violated No Rights of Appellant. (Answer to Appellant's Point VI.)

While appellant *claims* in his Point VI (Br. 13) that, (a) the Information was not filed in accordance with Section 591, U. S. C. A., and Section 995, Penal Code of California, (b) it was filed without reasonable and probable cause, and (c) the Fifth Amendment to the Constitution was violated, no authority is cited or argument made to show how or in what way the claims are correct or applicable to this cause. Appellee asserts that no rights to which defendant was entitled were violated.

Section 591 of Title 18, U. S. C. (to which appellant refers, it is assumed) applies to State procedure for arrest, imprisonment, or bail and *not* to procedure in Federal Courts. *McNabb v. United States* (C. C. A. 6, 1944), 142 F. (2d) 904; *Roth v. United States* (C. C. A. 6, 1923), 294 F. 475; *Cf. United States v. Powlowski* (D. C. E. D. Pa., 1931), 270 Fed. 285; *United States v. Kelley* (C. C. A. 2, 1932), 55 F. (2d) 67.

The application of Section 995, Penal Code of California[8] is equally untenable, assuming for argument that its effect must be examined. The section applies only to *indictments* or *informations*. Every public offense in California must be prosecuted by indictment or information, except, among others, "offenses tried in municipal, justices' and police courts." Penal Code, Section 682. Those courts have exclusive jurisdiction of misdemeanors. Penal Code, Section 1462 (municipal courts), Section 1425 (Justices' courts), Section 1461 (police courts). Before those courts proceedings are commenced by complaint and *no* indictment or information is used. Penal Code, Section 1426. Therefore Section 995, applying only to indictments or informations, which are to be used only in felony cases, does not govern misdemeanors; as the instant cause is a misdemeanor, that section has no relevancy herein.

Basically, appellant's objection to the information seems to relate to the filing thereof on the grounds that (a) the verification did not show any reasonable or probable cause and (b) the court failed in its alleged duty to take evidence to see if such cause were present. That objection

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[8]§995. The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion in either of the following cases:

If it be an indictment:

1. Where it is not found, indorsed, and presented as prescribed in this code.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

is instantly disposed of by the case of *Wagner v. United States* (C. C. A. 9, 1925), 3 F. (2d) 864, wherein it was stated:

> "On the presentation of the case in this court, however, the plaintiffs in error raised the additional question of the jurisdiction of the court below, on the ground that the information was not based on probable cause, as required by the Fourth Amendment to the Constitution, nor upon a finding of probable cause by any court, judge, or commissioner, nor upon any preliminary hearing to ascertain whether there was probable cause.
>
> "This and other courts have held that the verification of an information is not required by any statute, and that it is only where the issuance of a warrant of arrest is sought upon this information that there must be an affidavit of one who knows the facts. Weeks v. United States, 216 F. 292, 132 C. C. A. 436, L. R. A. 1915B, 651, Ann. Cas. 1917C, 524; Brown v. United States, 257 F. 703, 168 C. C. A. 653; Carney v. United States (C. C. A.), 295 F. 607; Farinelli v. United States (C. C. A.), 297 F. 198. Here there is no question of the legality of a warrant of arrest, nor does it appear from the transcript that any such warrant was ever issued or applied for."

In the instant cause a warrant was applied for and issued, but the information was verified by the investigator as "true of his own knowledge" [R. 5]. Such a verification fulfills constitutional requirements. *Brown v. United States* (C. C. A. 9, 1919), 257 Fed. 703, cert. den. 251 U. S. 554; *Cf. Benn v. United States* (C. C. A. 9, 1928), 28 F. (2d) 509. Further, no motion to quash the *warrant* was ever made [R. 16].

V.

Appellant Cannot Question the Sufficiency of the Instructions Because He Made No Request for Further Instructions or Excepted to Those Given on the Ground of Insufficiency nor Was Appellant Denied Due Process of Law. (Answer to Appellant's Point VII.)

Appellant contends that the Court should have more fully and comprehensively instructed the jury concerning the provisions of Ration Order 5C because, as appellant believes, the order had been amended more than one hundred times and the jury should have been told what it allowed or forbade. Appellee sees no merit in such a contention.

However, whatever may be appellant's present position, the trial court committed no error. Appellant did not request any such charge as he now claims the court should have made [R. 133] nor did he take exception to any failure to so charge [R. 130]. Until a request is presented there is no opportunity for the court to make a ruling, and, when no request is made, there is no ruling. The trial court properly covered the issues and any failure to instruct cannot be assigned as error. Moreover, appellant did not assign as error the failure to so instruct [R. 142, 143]. *Bradshaw v. United States* (C. C. A. 9, 1926), 15 F. (2d) 970.

Appellant did not except to [R. 130] and assign as error [R. 143] the instruction given wherein Ration Order 5C was quoted. That such was not error has been hereinbefore discussed. At no time did appellant except to the giving thereof for the reason now proposed. For example,

in his grounds of appeal [R. 33], no such error was claimed. No error can therefore now be predicated. Local Rule 14(b); *Gilson v. United States* (C. C. A. 2. 1919), 258 Fed. 588. In this case it was stated:

> "On due request the trial judge might, and doubtless would, have descended into greater particularity in respect of the overt acts charged and proven. But as a general proposition of law the charge was so plainly right as to need no justification; and in so far as it was insufficient or too general in respect of this particular case or these particular defendants, the exception did not fairly or at all direct the attention of the court to the insufficiency now complained of. The exception was not sufficiently definite to call the court's attention to the particular matter objected to, and give opportunity to correct it."

Conclusion.

For the foregoing reasons, we contend the judgment below should be affirmed.

Respectfully submitted,

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